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APR 3 1942

(11)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,
vs.
LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.
No. 981.

REPLY BRIEF.

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REPLY BRIEF.

Respondent's Brief in Opposition to Petition for Writ of Certiorari Doesn't Purport to Meet the Questions Presented by Petitioner.

Respondent in its brief does not purport to meet and make answer to the questions which petitioner presents. On the contrary, it frames four questions of its own (Resps. Brief pp. 2-3) and then proceeds to demonstrate that its questions are without merit. There could be no point in any inquiry as to whether or not respondent has succeeded in burning its straw men.

Some of Numerous Misstatements of Fact in Respondent's Statement of Facts.

Due to press of time, we shall devote this short reply brief to the task of calling to the Court's attention some of numerous errors and misstatements of fact and of vol-

unteered statements dehors the record, as included in respondent's reply brief.

At page 3:

> "The constitutionality of the statutes is not questioned by petitioner."

If by this respondent means to state that petitioner makes no point that the Levee District Act, as written, is unconstitutional, the statement is true. However, petitioner contends vigorously that the statute as construed and applied in the particular case is unconstitutional.

At page 5, fourth paragraph:

We believe the record is silent as to whether or not petitioner's predecessor in title filed exceptions to the commissioners' report of either the first or second assessment of benefits.

At page 5, sixth paragraph:

> "No appeal was taken from this decree as was permitted by section 12509."

That section excludes any appeal by a landowner on the question of benefits. The appeal authorized (last clause of the section) is expressly limited to apply to that part of the decree wherein it is judicial and in an eminent domain proceeding (last sentence of section 12509, Appendix to Petition, page 89). The reason for that limitation is that the Court, in that part of the decree confirming the assessment of benefits, is as petitioner demonstrates made by the Court, not judicially, but as a reviewing agency of the legislative branch of government (Petition, page 34, paragraph 2; Specifications of Error I, page 44).

At pages 5-6:

Respondent states purported facts with reference to a purported issue of bonds and use of proceeds to pay for the planned improvement. At his reference (Resps. Add. Abst. pp. 57-72) it appears that the taxing resolution (appropriating under section 12534, Appendix to Petition pp. 96-97; Appellant's Abst. p. 133) was adopted on September 30, 1924, and there is no showing whatever that bonds were sold thereunder, or, if sold, what, if any, disposition or use was made of the funds. That resolution was passed on September 30, 1924, just fifteen days before October 15, 1934, the date on which respondent's petition was filed (Abs. p. 57) for approval of the Amended Plan for Reclamation theretofore adopted (Abs. p. 60). Considering the necessarily consumed time prior thereto after decision to adopt an amended plan and after adoption of the bond resolution before a sale and delivery of bonds could be made, either those bond proceedings must have been abandoned or the purchasers were wholly deceived as to the state of the record. Beyond that we do not understand what purpose, other than to attempt to create a prejudice, that record can serve in this proceeding. The bondholders are not complaining, if in fact there are any bondholders.

At page 7, first paragraph:

In this paragraph respondent attempts by inference, avoiding direct statement, to tell the Court that the proceedings under which its Amended Plan for Reclamation was adopted and approved were had under section 12538 (Appendix Petition, p. 100). This is not a true statement, nor is it an honest representation. Respondent is not being honest with the Court. Respondent in its "Petition to Amend the Plan for Reclamation" expressly proceeds (Abst. p. 62) under section 4636 (now section 12532; Abst.

pp. 75-77). In its amended petition on which the cause was tried respondent expressly pleads that on the fourth day of October, 1924, it "adopted a certain 'Amended Plan for Reclamation' under the provisions of section 4636 * * * now section 10942" (now section 12532) (Abst. p. 13). The State Supreme Court (against the same inferential statement) found and considered also that the proceedings were had under section 12532 (R. pp. 186, 188). Respondent relies on the judgment of the State Supreme Court and ought not to have made this contra and untrue representation in question.

At page 7, last full paragraph:

The statement of this paragraph is substantially correct, as can be verified from the references there made to the record. (See also Opinion, R. p. 190, last para.)

At pages 7-8:

The respondent emphasizes the lapse of time, but overlooks to inform the Court that enforcement of any assessment has been resisted consistently from the first attempt (see Resps. Brief pp. 8-9), and that the instant suit was instituted to the November Term, 1935 (Abst. p. 2).

At page 8, first to fourth paragraphs:

The respondent here purports to state of record, but the statement finds no support in the record and respondent, therefore, has not undertaken to make reference to the record for them.

At page 9, first paragraph:

The qualification "voluntarily" finds no support in the record. The reference (Resps. Add. Abst. p. 100) is to the purported findings of fact made by the trial court subsequently to the change, by post trial amendment, of plain-

tiff's petition from a claim on its second and "amended plan" and assessment to its first and "original plan" and assessment. Of course, no question is involved here as to whether or not the findings are without support. That would not constitute basis for a constitutional question. Our question is as to the constitutionality of the change of cause and the entry of judgment on the changed cause without hearing.

At page 9, second full paragraph:

Respondent purports to state a case reported in **68 S. W.** (2d) 871. There was no issue pleaded or tried with reference to any such case. Off the record, had such an issue been joined, petitioner as defendant would have pleaded and proven (1) that no constitutional issue was tendered, joined, tried or decided, and (2) that the judgment was procured by fraudulent and false testimony, in this, that an officer of the District testified that benefits to petitioner's lands were provided for in this way: That, in substance, the District had an oral contract with the United States Government by which, in consideration that the District would protect the lands from bank wash and erosion at the point where the "spur dykes" were provided and which would cast a cutting current against petitioner's island, the United States would construct protective works along the island to avoid the cutting; that the cutting resulted and then the United States built the protective works. Which testimony was preposterous and not true; that this was the only evidence on which the judgment could have been sustained. The defense was conducted by youthful and wholly inexperienced counsel. That patently fictitious claim wasn't repeated in this suit. The Government works there testified to were merely a part of the works constructed in a general river channel stabilizing program.

At pages 9 to 10:

Respondent refers to a suit in the United States District Court and refers to abstract page 4. The statement on the said reference is untrue and misleading (R. pp. 41-42). The judgment in that suit was not on the merits, but a dismissal by the District Court on the ground that it was without jurisdiction of the federal constitutional questions (Abs. p. 42). The action there in question is further evidence of continued resistance to imposition of the lien in question.

At page 10, first full paragraph:

Respondent calls attention to the fact that when it amended its petition after trial, petitioner filed no affidavit of surprise, and by inference that petitioner's (as defendant) remedy was under section 970 and by such affidavit. Respondent overlooks that the trial had been concluded and the cause submitted more than a month prior to that occasion.

Section 970 has no application to cases of failure of proof.

Leslie v. Ry. Co., 88 Mo. 50;
Beck v. Farara, 19 Mo. 30.

A party cannot plead one cause of action and recover on another.

Jones v. Waters, 17 Mo. 587;
Hubbard v. Ry. Co., 63 Mo. 68;
Boone v. Stover, 66 Mo. 430;
Clements v. Yeates, 69 Mo. 623;
Wilson v. Albert, 89 Mo. 537, 1 S. W. 209.

In case of departure, or proof of cause not pleaded, or total failure of proof, no affidavit is necessary.

Connor v. Ry. Co., 298 Mo. 18, 250 S. W. 574;
Hibler v. Rys. Co., 292 Mo. 14, 237 S. W. 1016;

Swift v. Ry. Co. (Mo. A.), 15 S. W. (2d) 974;
Inguerson v. Ry., 205 Mo. 328, 103 S. W. 1143;
Scovill v. Glasner, 79 Mo. 449.

In cases other than of immaterial variance the practice is that objection to the allowance of an amendment should be made when leave to amend is asked, followed by refusal to proceed on the amended petition. Which is what petitioner did (Abs. pp. 161-162).

Lee v. Battery Co. (Mo.), 23 S. W. (2d) 45;
Heman v. Glenn, 129 Mo. 525, 31 S. W. 589.

Respondent then takes out of its text a partial statement from the record. (The State Supreme Court did that, too, but incorporated more of the text.) Respondent then quotes it as an admission by petitioner that she didn't consider the post trial amendment material. Respondent leaves off this much of the statement employed by the Court: "but it certainly did succeed in effecting a more obscured statement of its cause." The language was taken by the Court from petitioner's brief wherein it constituted a part of an argument that the respondent's petition after the amendment then contained enough of statement of reliance on the "Amended Plan" and assessment and enough of statement of reliance on the "Original Plan" and assessment that it was within the range of possibilities that it might be construed to be on either of them, but that in the one case it fell with failure of proof and in the other fell for departure—a perfectly innocuous statement of doubt.

We are not suggesting that it is the province of this Court to pass on the merits of the controversy on the petition for certiorari. Respondent may entertain that opinion. It does seem to us, however, that there is so little of true statement commingled with so much of false, careless or misleading statement in the statement section of respondent's brief as to deprive it wholly of all value.

At page 11, paragraph numbered 1:

From the beginning to end of this proceeding, plaintiff's lands have been identified by both petitioner and respondent as "Bull Island" and as separated from the mainland by a wide slough, as they are described in plaintiff's petition, page 21. Anyone who has eyes can read the lines on the plat (Rec. following p. 98): "South Bank of Bull Island, April 1915," "River Bank of April 1915," and the existence of the area between the two, water in 1915, lowlands (elevation figures) in 1923.

At page 12, paragraph numbered 2:

It is petitioner's contention, based on respondent's petition and proof, that none of the improvements provided for by respondent's "Original plan" were made under that plan. There was no issue involved as to that contention. Respondent pleaded (Abs. p. 16) that after it had adopted its "Amended plan" it commenced and completed the work in accordance with it (R. p. 16), and petitioner admitted that fact (R. p. 24). The state court found that the improvement was constructed under the "Amended plan."

It is fundamental in the law of procedure in Missouri that a party will not be permitted to contradict an allegation of his pleading.

Wilson v. Albert, 89 Mo. 537, 1 S. W. 209;
Weil v. Poston, 77 Mo. 284;
Bruce v. Sims, 34 Mo. 246.

At page 12, paragraph numbered 3:

The statement there quoted is from petitioner's petition for writ of certiorari. Petitioner expects to be able to establish it. Even a nonexpert computation of the cost of building the levees across the slough would carry the cost far beyond the total benefits assessed. The statement is

taken near verbatim from testimony of respondent's chief engineer.

At page 13, second full paragraph:

Respondent misconceives petitioner's point. It is that the landowners who signed the petition for incorporation contemplated enclosing all lands, and the complaint is that, on the engineer's recommendation, the landowners' purpose to enclose Bull Island was abandoned.

At page 13, third paragraph:

Respondent's statement is picked out of clear air and cannot be given even argumentative foundation on the record.

At pages 13-14 and

At page 14, paragraph numbered 4:

The assessments in full on all lands are in evidence; so also are the elevations of lands. Petitioner's point is that lands of like elevation, not high lands on the shore opposite Bull Island, were assessed alike. Petitioner will be able to demonstrate in dollars and cents, at a hearing on the merits if that be had, that the statement in her petition is literally true.

Respondent's Brief.

Preliminarily:

It could serve no useful purpose to reply point by point to the brief and argument of respondent made to the end of destroying its straw men. The argument is not directed against either the questions presented by or the brief of petitioner thereon. However, there are some instances in which petitioner believes the inapplicability of contention of respondent's brief ought to be suggested to the Court.

I.

Throughout this point and its subdivisions respondent overlooks and doesn't attempt to meet the underlying philosophy of petitioner's contention that a state statute may violate the Federal Constitution either by its terms or by the construction and application given it, and that the one is as fatal as the other.

II.

Respondent overlooks a fundamental consideration, the counterpart of its brief, which is that, where a federal question is decisive of the case regardless of the judgment on the other issues, the constitutional consideration prevails, it being the higher law.

III, IV, V.

These points are fully met in petitioner's brief, supplemented by what we have said above with reference to variance and departure.

Respectfully submitted,

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